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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

CENTER FOR BIOLOGICAL
DIVERSITY, et al.,

Plaintiffs

v.

UNITED STATES BUREAU OF LAND
MANAGEMENT, et al,

Defendants.

Case No: 3:17-cv-00553-LRH-WGC

**DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT
AND IN OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The United States Bureau of Land Management (“BLM”); Ryan Zinke, in his official capacity as Secretary of the Interior; and Brian Steed, exercising the authority of the Director of the BLM, (collectively “Federal Defendants”), hereby move for summary judgment and oppose Plaintiffs’ Motion for Summary Judgment (“Pls. Mem.”) (ECF No. 45). The Plaintiffs have failed to meet their burden of demonstrating that BLM violated the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321-4370h, in authorizing the June 2017 and September 2017 Nevada oil and gas lease sales.

To support the June lease sale, BLM prepared a thorough and detailed environmental assessment analyzing the environmental impacts associated with the oil and gas development that would occur on leased parcels. BLM considered the impacts to wildlife, water resources, and other resources that could result from the activities associated with oil and gas development and reasonably analyzed those impacts. In response to comments received on its draft environmental assessment, BLM added additional protective measures in a revised environmental assessment, which were incorporated into BLM’s decision approving the lease sale. BLM reasonably concluded that the additional protections established in the revised environmental assessment would avoid significant impacts to the environment due to the oil and gas leases. For the September lease sale, BLM relied on its prior analysis prepared for the June lease sale, and reasonably concluded that the impacts of oil and gas development from the three parcels offered in the sale would not have significant environmental impacts.

In sum, BLM has reasonably analyzed the environmental impacts of leasing the parcels at issue in the June and September 2017 lease sales, in accordance with NEPA, and therefore summary judgment should be granted to Defendants.

BACKGROUND

I. Legal Background

A. National Environmental Policy Act

NEPA serves the dual purpose of informing agency decision-makers of the significant environmental effects of proposed major federal actions and ensuring that relevant information is

1 made available to the public so that they “may also play a role in both the decisionmaking
2 process and the implementation of that decision.” *See Robertson v. Methow Valley Citizens*
3 *Council*, 490 U.S. 332, 349 (1989). NEPA is procedural in nature. “[I]t is now well settled that
4 NEPA itself does not mandate particular results, but simply prescribes the necessary process.”
5 *Id.* at 350 (citing *Stryker’s Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980)).
6 “Other statutes may impose substantive environmental obligations on federal agencies, but
7 NEPA merely prohibits uninformed – rather than unwise – agency action.” *Robertson*, 490 U.S.
8 at 351.

9 To meet these dual purposes, NEPA requires that an agency prepare a comprehensive
10 environmental impact statement (“EIS”) for “major Federal actions significantly affecting the
11 quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.3. The Council
12 on Environmental Quality’s (“CEQ”) regulations implementing NEPA provide guidance as to
13 the nature and content of an EIS. *See* 40 C.F.R. § 1502. Those regulations direct the preparer to
14 include an analysis of alternatives to the proposed action in an EIS, *see id.* § 1502.14, and further
15 instruct that the document should include discussions of direct, indirect, and cumulative impacts,
16 *id.* §§ 1502.16 (a)-(b), 1508.7, 1508.8, 1508.25(c), as well as means to mitigate adverse
17 environmental impacts from the proposed action. *Id.* § 1502.16(h). Not every federal action or
18 proposal, however, requires an EIS. CEQ’s regulations provide that an agency may prepare an
19 environmental assessment (“EA”) to determine whether the impacts of an action will be
20 significant, and if not, the agency may prepare a finding of no significant impact (“FONSI”).
21 *See* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9, 1508.13.

22 For large or complex plans and programs, CEQ’s regulations allow an agency to analyze
23 environmental impacts in phases through a tiered NEPA process. *See* 40 C.F.R. § 1502.20. An
24 agency may tier its analysis to a prior NEPA analysis, meaning that the prior analysis is
25 incorporated by reference. 40 C.F.R. § 1508.28. Tiering is appropriate when an agency first
26 develops a general plan or program and then plans a site-specific project to implement that plan.
27 40 C.F.R. § 1508.28(a). “Agencies are encouraged to tier their environmental impact statements
28 to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for

1 decision at each level of environmental review” *Id.* § 1502.20. Tiering is appropriate either
 2 in situations where an agency is developing a general plan or program to be followed by site-
 3 specific projects implementing the plan or where an agency is evaluating the impacts of a
 4 specific project at various stages of the project’s development. 40 C.F.R. § 1508.28(a)-(b).

5 In reviewing the sufficiency of an agency’s NEPA analysis, a court should evaluate
 6 whether the agency has presented a “‘reasonably thorough discussion of the significant aspects
 7 of the probable environmental consequences.’” *California v. Block*, 690 F.2d 753, 761 (9th Cir.
 8 1982) (citation omitted). “The reviewing court may not ‘fly speck’ an EIS and hold it
 9 insufficient on the basis of inconsequential, technical deficiencies.” *Ass’n of Pub. Agency*
 10 *Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997) (citation
 11 omitted); *see also Swanson v. U.S. Forest Serv.*, 87 F.3d 339, 343 (9th Cir. 1996). A reviewing
 12 court is not to “substitute its judgment for that of the agency.” *Block*, 690 F.2d at 761. Rather,
 13 “[o]nce satisfied that a proposing agency has taken a ‘hard look’ at a decision’s environmental
 14 consequences, the review is at an end.” *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21
 15 (1976)).

16 **B. Oil and Gas Leasing on Public Lands**

17 The Mineral Leasing Act (“MLA”), 30 U.S.C. §§ 181–287, authorizes the Secretary of
 18 the Interior to offer certain federal minerals for lease, including oil and gas. The Secretary has
 19 delegated this authority to BLM for onshore minerals. *See* 43 C.F.R. § 3100.0-3. To implement
 20 the MLA, BLM promulgated regulations that govern leasing and development of federal onshore
 21 oil and gas on public lands and federal mineral estates. *See* 43 C.F.R. Parts 3100-3180.

22 BLM employs a three-stage decision-making process for managing public lands for oil
 23 and gas leasing and development. *See Pennaco Energy, Inc. v. U.S. Dep’t of Interior*, 377 F.3d
 24 1147, 1151–52 (10th Cir. 2004). First, BLM broadly assesses the presence of minerals and other
 25 resources on public lands through land-use planning, which includes determining areas open to
 26 and closed to potential oil and gas development and determining, for open areas, what
 27 conservation stipulations should apply to future leases. 43 C.F.R. § 1601.0-5(n). The resource
 28 management plans (“RMPs”) that result from this process guide future decision making but do

1 not authorize specific projects, unless expressly stated. *See* 43 C.F.R. § 1601.0-5(n). The RMPs
2 developed by BLM are supported by EISs prepared in accord with NEPA. The EISs provide an
3 analysis of the potential environmental impacts of oil and gas leasing and development and other
4 resource impacts, 43 C.F.R. § 1601.0-6, based on reasonably foreseeable development scenarios.
5 Once BLM issues an RMP, subsequent, more specific decisions implementing specific projects
6 must conform to the plan. 43 C.F.R. § 1610.6-3(a).

7 In the second stage of resource development, BLM State Offices perform NEPA and
8 other analyses and hold competitive oil and gas lease sales. 30 U.S.C. § 226(b)(1)(A); *see* 43
9 C.F.R. Subpart 3120; 43 C.F.R. § 3120.1-2(a). Typically, for each oil and gas lease sale, BLM
10 prepares an EA which “tiers” to the EIS prepared at the RMP stage. *See* 40 C.F.R. § 1508.28
11 (NEPA regulations on tiering). Lands that may be offered for leasing include: lands formerly
12 subject to oil and gas leases that have terminated, expired, been canceled or relinquished; lands
13 selected by the authorized officer; lands where federal mineral resources are being drained by the
14 development of connected non-federal resources; and lands identified in “expressions of interest”
15 from the public. 43 C.F.R. § 3120.1-1(a)-(f). Once BLM identifies parcels to be offered and
16 completes required analysis, it holds a competitive lease sale, where the parcels are auctioned
17 and sold to the highest qualified bidder. *Id.* §§ 3120.5-1, 3120.5-3. Forty-five days in advance
18 of sales, BLM state offices post notices on agency webpages, and in the responsible district or
19 field offices, which include lists of offered parcels and their stipulations. *See* 43 C.F.R. §
20 3120.4-2. Any interested party may protest the offering of a parcel for sale within ten days of
21 posting of the notice. *See* IM 2018-034 (available at <https://www.blm.gov/policy/im-2018-034>
22 (last checked August 21, 2018)).

23 The third stage of resource development occurs following lease issuance, when BLM
24 determines whether, and under what conditions, it will approve specific development proposals.
25 30 U.S.C. § 226(g); 43 C.F.R. § 3162.3-1 (2017). Before an oil and gas operator may undertake
26 any drilling or surface disturbance, it must submit an application for a permit to drill (“APD”), at
27 which point BLM completes additional environmental review to ensure NEPA compliance and
28 imposes any necessary conditions on its approval. *See* 43 C.F.R. § 3162.3-1; *see also* *Amigos*

1 *Bravos v. U.S. Bureau of Land Mgmt.*, Nos. 6:09-cv-00037-RB-LFG; 6:09-cv-00414-RB-LFG,
2 2011 WL 7701433 *5 (D.N.M. Aug. 3, 2011) (discussing the leasing and development process
3 and noting BLM's authority to "impose any necessary conditions of approval" at the APD stage).

4 **II. Factual Background**

5 On June 13 and 14, 2017, and September 12, 2017, BLM held quarterly oil and gas lease
6 sales pursuant to the MLA, 30 U.S.C. § 226(b)(1)(A), for 106 parcels of land (195,600 acres),
7 and three parcels of land (3,680 acres), respectively, within the Battle Mountain District, Nevada.
8 AR 1395, 1312, 5887. In the June sale, BLM sold three parcels competitively (parcels 35, 36,
9 and 106), and four more parcels the next day, non-competitively (parcels 33, 34, 38, and 41).
10 AR 1402.¹ Parcels not sold for lease remain available for sale non-competitively for up to two
11 years beginning the day after the sale. AR 1401.² All three of the parcels offered in September
12 were competitively sold. AR 5894. The Center for Biological Diversity and the Sierra Club
13 protested both lease sales. AR 1268 (May 25, 2017), AR 5986 (July 24, 2017). BLM dismissed
14 the protests by decisions in June and September, 2017. AR 25543 (June 12, 2017), AR 6059
15 (September 13, 2017).

16 BLM's NEPA analysis for the June 2017 sale, on which the agency also relied for its
17 September 2017 sale, commenced formally in November 2016, when resource specialists
18 undertook field visits, as part of a NEPA scoping effort, and began coordination with nearby
19 Native American tribes and the Nevada Department of Wildlife ("NDOW"). AR 5670. On
20 January 5, 2017, BLM published a Preliminary Environmental Assessment, referred to here and
21 in BLM's decision document, AR 5649, as the "draft EA." AR 63513. The draft EA included
22 an alternatives analysis that identified three possible actions: the proposed action (*i.e.*, leasing of
23 all 106 proposed parcels), the required "no action" alternative, and a Partial Deferral alternative,
24 intended to protect resources not protected by existing stipulations and restrictions in the
25

26 ¹ The results of the lease sales are available at: [https://www.blm.gov/programs/energy-and-](https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada)
27 [minerals/oil-and-gas/leasing/regional-lease-sales/nevada](https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/nevada).

28 ² Although the information is not available from BLM's website, BLM has leased an additional
28 parcels non-competitively since the June 2017 lease sale.

governing RMPs. AR 63531-52. BLM made the draft EA available for a 30-day comment period beginning on January 5, 2017. AR 5671.

On April 25, 2018, BLM published the final EA, referred to simply as “the EA.” *See* AR 5649, 5651-5886. The EA included the proposed action, the “no action” alternative, a Partial Deferral alternative, and a new Additional Resource Protection (“Resource Protection”) alternative. AR 5674-75. The Partial Deferral alternative was identical to the proposed action “except that parcels or parts of parcels would be proposed for deferral [from leasing,] pending develop[ment of] stipulations for an updated RMP that would address resources that are not adequately protected under either or both of the [currently] governing RMPs, or otherwise resolving the concerns.” AR 5674.³ Under the new Resource Protection alternative, BLM would apply new stipulations and lease notices for protection of wildlife habitat, water resources, and areas with steep slopes to the parcels that would be deferred from leasing under the Partial Deferral alternative. AR 5659, 5671, 5675. The EA noted that the Resource Protection alternative benefitted more acreage than the Partial Deferral alternative. AR 5702.

Within the context of these alternatives, the EA analyzes the effects of the lease sale, including, to the extent feasible at the lease stage, possible future exploration and development activities, as well as the cumulative effects of the lease sale when added to all past, present, and reasonably foreseeable future actions within potentially affected area. AR 1532, 5682, 5755. The EA reflects the agency’s consideration of historical data, as well as the knowledge and expertise of BLM resource specialists, which is based in part on field inspections and review of databases and file information. AR 5659. The Resource Protection alternative includes stipulations for pronghorn antelope seasonal habitat, a timing limitation for mule deer seasonal habitat, a lease notice for mule deer migration corridors, a new stipulation for slopes greater than 30% stipulation, and a new water resources stipulation, among other things. AR 5671, 5674 (describing the alternatives BLM considered and their stipulations), 5791 (Appendix B:

³ Stipulations and lease notices inform prospective lessees of important resources associated with particular parcels, identify protective measures, and ensure that necessary protective measures are applied when development activity is proposed. AR 1531-32 (FONSI).

1 Stipulations and Lease Notices, applicable to specific parcels under all three action alternatives),
2 5808 (Appendix C: Stipulations, Timing Limitations, and Lease Notices for the Partial Deferral
3 alternative and the Resource Protection alternative).

4 All offered parcels, including the parcels sold at or following the June sale and those sold
5 at the September sale, are subject to lease notices for threatened and endangered, sensitive, and
6 special status species that allow BLM to disapprove activity on a lease if it is likely to result in
7 jeopardy to a listed species or to adversely modify designated or proposed critical habitat. AR
8 5794. In addition, the notices provide that BLM will not approve ground-disturbing activity that
9 may affect listed species until Endangered Species Act (“ESA”) obligations are met. *Id.* For
10 species not listed under the ESA, the lease notices provide protection by allowing modification
11 during the development stage, when lessees submit APDs, to prevent the need to list a species.
12 *Id.* The parcels also include lease notices for Migratory Birds, Cultural Resources and Tribal
13 Consultation, Mining Claims, and Fire. AR 5794, 5795, 5799, 5800. The EA also included
14 stipulations to protect Greater Sage-Grouse and its habitat. AR 5801-5807.

15 In addition to affording considerable wildlife protections, the Resource Protection
16 alternative was also designed to conserve important water resources and it sought to avoid
17 degradation of steep slopes through a variety of protective measures. It did so through two new
18 controlled surface use stipulations. AR 5819-5833. The first of these, the new water resources
19 stipulation, was developed to prevent or limit adverse impacts to important water resources, such
20 as rivers, streams, flood plains, playas, wetlands, springs, and seeps and to maintain proper
21 functioning of these water resources, chiefly by establishing protective buffers around important
22 water resources. AR 5827. The second stipulation included provided various protections for
23 slopes greater than 30%, intended to maintain soil stability and prevent erosion or slope failure,
24 and to promote successful site reclamation. AR 5832.

1 For all of the action alternatives analyzed in the June 2017 lease sale, BLM's Reasonably
2 Foreseeable Development ("RFD") scenario⁴ estimated that potential exploration and production
3 on leases within the Battle Mountain District as a whole⁵—not just the lease parcels proposed in
4 the June 2017 sale—would involve the development of 25 oil and gas wells and the disturbance
5 of, at most, 65-100 acres of public land. AR 5677-5678.

6 The EA also analyzed the effects of hydraulic fracturing. AR 5679, 5700, *see also* AR
7 5841 (App. E). Used in the United States since the 1940s, hydraulic fracturing "cracks" existing
8 formations and allows hydrocarbons to flow more readily, making unconventional oil production
9 more attractive economically. AR 5679, 5841. In its discussion of anticipated activities, BLM
10 explained the predictable sequence of events for each phase of typical oil and gas development.
11 AR 5678. The agency noted that, during development of a lease, one of the anticipated effects of
12 hydraulic fracturing is the use of surface or groundwater during operations (AR 5679, 5699-
13 5702, 5752, *and see* AR 5841, App. E). The EA noted that negative effects to groundwater from
14 use of improper, unsuitable, or inadequate well construction materials and practices could occur.
15 AR 5700; *see* AR 5679 (mitigation for hydraulic fracturing), and AR 5846. In addition the EA
16 noted that use of fracturing for enhancing oil recovery may also result in geologic hazards such
17 as earthquakes (AR 5743, 5850), and spills, including discharge to navigable waters (AR 5850-
18 5851). A lessee or operator that seeks to develop and operate a well during the APD stage is
19 subject to various controls by the BLM (AR 5699-5700, 5841, 5851, 13955 (Onshore Order 1,
20 72 Fed. Reg. 10,308 (Mar. 7, 2007)), 13970 (Onshore Order 2, 53 Fed. Reg. 46,798 (Nov. 18,
21 1988)), and 14090 (Onshore Order 7, 58 Fed. Reg. 47,354 (Sept. 8, 1993)) and the State of
22 Nevada (AR 5680, 5699, 5700 (by BLM regulation--Onshore Order #1--all lessees and operators
23 must comply with applicable state laws on federal leases), and 5852).

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25
26 ⁴ An RFD scenario is a projection of future potential oil and gas activities and surface
disturbance based on actual past activities, estimated over the next 10 years. AR 5676, 5680.

27 ⁵ The Battle Mountain District of BLM Nevada is comprised of approximately 10.5 million acres
28 of public land. *See* <https://www.blm.gov/office/battle-mountain-district-office> (last visited on
August 22, 2018).

1 Wells that are hydraulically fractured are closely monitored from construction of the well
2 casing, to flowback of the water and proppant mix, to the capture of gas emissions, if any, and
3 disposal of wastewater from the hydraulic fracturing process itself. AR 5841-42. While
4 groundwater withdrawals in Nevada are largely for agricultural use (77%), six to seven percent
5 of all statewide water withdrawal is used for mining, including oil and gas extraction. AR 5843.
6 And, while water demand for domestic use, wildlife, and recreation is increasing in the state (AR
7 5844), the EA explains that increased statewide demand—particularly municipal and industrial
8 demand—will be met by increased conservation, use of alternative sources (such as reused or
9 reclaimed water, or greywater), purchases, leases or other water transfers, or by new
10 groundwater appropriations. *Id.*

11 On June 6, 2017, BLM issued a FONSI, in which it found that the June 2017 sale would
12 not significantly affect the quality of the human environment and therefore an EIS was not
13 required. AR 1531. The agency concluded that the selected action (*i.e.*, the Resource Protection
14 alternative) was consistent with the governing RMPs and included appropriate protective
15 measures to avoid and minimize environmental impacts. AR 1531-32. As the decision record
16 for the June 2017 lease sale noted, BLM found that the selected action would not result in
17 unnecessary or undue degradation of the public lands and that the requirements of applicable
18 laws and administrative policies had been met. AR 5648-5649. While a lease holder is permitted
19 to use as much of the leased land as necessary to explore for oil and gas within lease boundaries,
20 BLM's decision explains that any future development activity would be subject to stipulations
21 and BLM's approval of surface disturbing activities after additional environmental review. *Id.*

22 In support of the September 2017 lease sale, BLM prepared a Determination of NEPA
23 Adequacy ("DNA"), which recognized that the three offered parcels were included in an area
24 designated as open to oil and gas development and noted that one of the parcels was located
25 adjacent to parcel 106, offered and sold in the June 2017 lease sale, and that the other two parcels
26 were located nearby. AR 5913. Based on its determination that the three parcels have
27 geographic and resource conditions similar to parcel 106, a conclusion based on field visits to the
28 parcels, AR 5921, and that the three parcels would therefore be subject to the same stipulations

1 and lease notices as parcel 106, BLM determined, consistent with agency policy regarding the
 2 use of DNAs, that the environmental review in the June 2017 EA was sufficient to support the
 3 September 2017 lease sale. *Id.* Like the June parcels, all three parcels were offered with lease
 4 notices for Endangered Species, Migratory Birds, Cultural Resources, Mining Claims, and Fire.
 5 AR 5917-5919. BLM posted the DNA on its website for a two-week public comment period in
 6 June 2017, but no comments were received. AR 5923.

7 STANDARD OF REVIEW

8 The Court's review of the Plaintiff's NEPA, FLPMA, and NHPA claims is governed by
 9 the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06.
 10 See *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1135 (9th Cir. 1998). Under the
 11 APA, agency decisions may be set aside only if they are "arbitrary, capricious, an abuse of
 12 discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Review under this
 13 standard is "'highly deferential, presuming the agency action to be valid and affirming the
 14 agency action if a reasonable basis exists for its decision.'" *Nw. Ecosystem All. v. U.S. Fish &*
 15 *Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted). An agency's decision will
 16 be overturned

17 only if the agency relied on factors which Congress has not intended it to
 18 consider, entirely failed to consider an important aspect of the problem, or offered
 19 an explanation for its decision that runs counter to the evidence before the agency,
 20 or is so implausible that it could not be ascribed to a difference in view or the
 21 product of agency expertise.

22 *McFarlane v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008) (citation and quotation marks
 23 omitted); see also *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971) (explaining
 24 that the role of the reviewing court is to determine whether "the decision was based on a
 25 consideration of the relevant factors and whether there has been a clear error of judgment"). The
 26 APA "does not allow the court to overturn an agency decision because it disagrees with the
 27 decision or with the agency's conclusions about environmental impacts." *River Runners for*
 28 *Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010).

Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In APA actions, however, the Court’s review is based on the agency’s administrative record. *See Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 883-84 (1990). Thus, the Court’s role is not to resolve factual issues, but rather to determine whether the agency’s record supports the agency’s decision as a matter of law under the APA’s arbitrary and capricious standard of review. *See Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) (“[T]his case involves review of a final agency determination under the [APA]; therefore, resolution of this matter does not require fact finding on behalf of this court. Rather, the court’s review is limited to the administrative record.”); *see also Occidental Eng’g Co. v. Immigration and Naturalization Serv.*, 753 F.2d 766, 769 (9th Cir.1985) (In an APA case, “the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision that it did.”).

ARGUMENT

I. BLM Took a Hard Look at the Environmental Impacts of the Lease Sales in Accordance with NEPA

A. BLM Did Not Improperly Postpone Analysis of the Impacts of Development

Contrary to Plaintiffs’ assertions, BLM did not ignore the potential impacts of development, and it analyzed such impacts in an appropriate level of detail at the lease stage. Plaintiffs’ arguments simply misstate the EA and the relevant law.

Plaintiffs argue that BLM failed to analyze the impacts of development in violation of the requirement to analyze environmental impacts when the agency makes an “irretrievable commitment of resources” towards permitting development activities to occur. *See* Pls. Mem. at 26 (quoting *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 717-18 (10th Cir. 2009)); *see also Conner v. Burford*, 848 F.2d 1441, 1451 (9th Cir. 1988). As Plaintiffs point out, BLM may not avoid a NEPA analysis at the leasing stage leases that may involve surface occupancy. *See Conner*, 848 F.2d at 1451. Plaintiffs assert that BLM “refus[ed] to

1 analyze impacts at the leasing stage,” Pls. Mem. at 26, but their arguments simply
2 mischaracterizes the EA.

3 To support their misguided argument that BLM has avoided analyzing the impacts of oil
4 and gas development at the lease stage, Plaintiffs omit the relevant language from the EA. Stated
5 without omissions, the paragraph of the EA quoted in their brief states:

6 An EA must analyze and describe the direct effects and indirect effects of the
7 proposed action and alternatives on the quality of the human environment. Direct
8 effects “are caused by the action and occur at the same time and place,” while
9 indirect effects “are caused by the action and are later in time or farther removed
10 in distance, but are still reasonably foreseeable” (40 CFR 1508.8). There would
11 be no direct impacts from issuing new oil and gas leases because leasing does not
12 directly authorize ground disturbing activities. *However, if a lease is sold, the*
13 *lessee retains certain irrevocable rights.* For example, according to 43 CFR §
14 3101.1-2, once a lease is issued to its owner, that owner has the “right to use as
15 much of the lease lands as is necessary to explore for, drill for, mine, extract,
remove and dispose of the leased resource in the leasehold” subject to specific
nondiscretionary statutes and lease stipulations. Thus, a lease sale makes the
offered parcels available to indirect effects (occurring at a later time). This
chapter addresses those indirect effects. If an APD is received for a leased parcel,
additional site-specific, project specific NEPA analysis would address direct and
indirect effects of any action and alternatives proposed at that time.

16 AR 5682 (emphasis added). Accordingly, Plaintiffs are simply incorrect that BLM has
17 misconstrued its obligation to conduct a NEPA analysis at the lease stage.

18 The additional examples from the EA that Plaintiffs point to likewise cherry-pick
19 statements relating to the impacts of issuing a lease (which has no environmental effects of its
20 own), while ignoring associated statements regarding the impacts of later development of the
21 leases. Plaintiffs argue, for example, that the EA says the lease sale itself will have no direct
22 impacts on water resources. Pls. Mem. at 26 (citing AR 5699). But they omit statements on the
23 same page regarding the indirect effects of issuing the leases, which include the impacts of
24 development of the leases. *See, e.g.,* AR 5699 (“Subsequent development of a lease may result
25 in long and short term alterations to the hydrologic regime depending upon the location and
26 intensity of development.”). For the analyses of other resources, they likewise ignore the EA’s
27 analysis of the impacts of development. *See* AR 5709-10 (analyzing the impacts of oil and gas
28 development on vegetation); AR 5686-92 (analyzing the impact of oil and gas development on

1 climate change); AR 5713-17 (analyzing the impacts of oil and gas development on wildlife);
2 AR 5743-46 (analyzing the impacts of oil and gas development on geology and minerals).
3 Accordingly, Plaintiffs' argument is factually incorrect and therefore must be rejected.

4 Moreover, BLM has analyzed the impacts of oil and gas development to an appropriate
5 degree at the leasing stage. Plaintiffs are correct that the BLM cannot avoid analyzing the
6 impacts of development at the leasing stage. *See* Pls. Mem. at 27-28 (citing *Conner*, 848 F.2d at
7 1450-51). But that does not mean that BLM was required by NEPA to analyze in detail the
8 impacts of developing particular sites, because the details of which sites will be developed are
9 not known at the leasing stage. At the time of a leasing decision, BLM does not know which
10 sites will be developed and it has no development plans before it, and therefore it is appropriate
11 for BLM to leave the analysis of specific development plans to a later stage. *See N. Alaska*
12 *Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006) (BLM was not required to conduct
13 a "parcel by parcel examination of potential environmental effect" to support a decision to offer
14 a large area for oil and gas leasing); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the*
15 *Interior*, 608 F.3d 592, 600 (9th Cir. 2010) ("BLM, in some cases, may adapt its assessment of
16 environmental impacts when the specific locations of an exploration project's activities cannot
17 reasonably be ascertained until some time after the project is approved.").

18 Indeed, in *Northern Alaska*, the Ninth Circuit clarified its prior ruling in *Conner* and
19 addressed the very point that Plaintiffs are arguing here. *Northern Alaska* involved BLM's
20 decision to offer a large are in northern Alaska—the Northwest Planning Area—for oil and gas
21 leasing. 457 F.3d at 973. Relying on *Conner*, the Plaintiffs argued that BLM was required to
22 analyze the impacts of developing particular parcels before approving the area for leasing. *Id.* at
23 976. The Ninth Circuit explained, however, that on the issue of whether the analysis of
24 particular parcels is required by NEPA, "*Conner* is of no assistance to plaintiffs, for we did not
25 discuss the degree of site specificity required in the EIS." *Id.* The court went onto explain that
26 "NEPA applies at all stages of the process" and "[a]ny later plan for actual exploration will be
27 subject to a period of review before being accepted, rejected or modified by the Secretary." *Id.*
28 at 977. Therefore, the court concluded that at the time the decision was made to lease the area,

1 “the government was not required to do a parcel by parcel examination of potential
2 environmental effects.” *Id.* Further, “[s]uch analysis must be made at later permitting stages
3 when the sites, and hence more site specific effects, are identifiable.” The Tenth Circuit is in
4 accord. *See Richardson*, 565 F.3d at 718. Thus, BLM was permitted by NEPA to defer the
5 analysis of specific parcels until later stages of development.⁶

6 Accordingly, Plaintiffs are simply incorrect that BLM refused to analyze the impacts of
7 oil and gas development, and BLM’s analysis was sufficient to comply with NEPA.

8 **B. BLM Took a Hard Look at the Impacts of Fracking**

9 BLM took a hard look at the impacts of fracking, and its analysis of the potential
10 environmental impacts of using such drilling techniques in the development of leases was
11 sufficient at the lease sale stage.

12 In the EA, BLM explains that hydraulic fracturing or “fracking” is a common technique
13 used by the oil and gas industry to extract oil and natural gas. AR 5679. The process involves
14 using pressurized fluid to open fractures in the oil- or gas-bearing formations. *Id.* A “proppant”
15 (usually sand) is used to keep fractures open and enhance the flow of oil and gas from the
16 formation to the wellbore. *Id.* It is a process that was developed in the 1940s and has been in
17 use since the 1950s. Modern, multi-stage fracking uses a considerable amount of water. The EA
18 estimates that 800,000 to 10,000,000 gallons of water can be used during the fracking process.
19 *Id.* The EA states that for four wells developed in Nevada using fracking techniques, up to
20 350,000 gallons of water were consumed per well. *Id.* In order to mitigate the environmental
21 impacts of fracking, a number of techniques may be used. These include proper cementing of
22 the annulus (space between the well casing and the wall of the well bore) to prevent fluid from
23 leaking, containing fracking fluids in tanks or lined pits, and disposing of fracking fluids through
24 underground injection, treatment and reuse, or other methods. *Id.* The EA also explains that the
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27 ⁶ *Center for Biological Diversity v. Bureau of Land Management*, 937 F. Supp. 2d 1140 (N.D.
28 Cal. 2013) is distinguishable because, in that case, BLM did not sufficiently analyze the impacts
of fracking at the lease stage, not because site-specific analysis was required. *See id.* at 1157-58.
The case is discussed in section I.B, *infra*.

1 State of Nevada has adopted standards for the regulation of fracking that are stricter than federal
2 requirements and would apply to fracking operations in the state. AR 5680.

3 BLM also prepared, and attached to the EA as Appendix E, a Hydraulic Fracturing White
4 Paper (“White Paper”). AR 5841. The White Paper was initially written by BLM’s Wyoming
5 State Office and later was modified for leasing in Nevada. *Id.* The White Paper contains a
6 detailed analysis of fracking techniques, water consumption, potential impacts on water
7 resources, potential seismic impacts, and spill prevention and response. AR 5841-52. It explains
8 that fracking may be used to drill wells either vertically, horizontally, or directionally, and the
9 well depth may vary from greater than 10,000 feet to less than 1,000 feet. AR 5842. The
10 amount of water consumed varies depending on the depth of the well: 50,000 to 300,000 gallons
11 are needed for shallow wells and 800,000 to 10 million gallons may be needed for deeper wells.
12 *Id.* Drilling fluids are 95-99% water and also contain a small percentage of chemical additives,
13 as well as proppant. AR 5842-43. Nevada Division of Minerals regulations require the reporting
14 of the chemicals used in fracking and the amounts within 60 days of the completion of the
15 fracking operations. AR 5843.

16 The White Paper analyzes the availability of water for purposes of fracking. *Id.* Water
17 withdrawals for all purposes are projected to increase nine percent statewide in 2020 due to an
18 increasing population and increased economic activity. *Id.* Surface water supplies in the Nevada
19 are nearly fully appropriated, and remaining water sources are in basins farther from urban
20 centers. AR 5843-44. Any water used for fracking is subject to Nevada’s laws governing
21 property rights to and the use of water. AR 5844. Water used in fracking may come from
22 various sources, including sources outside of the state, purchased irrigation water, treated waste
23 water, water produced from oil and gas production, and recycled drilling water. AR 5844-45.

24 As explained in the White Paper, fracking techniques may have environmental impacts to
25 water resources. AR 5846. Impacts may be caused by the leaks or spills of chemical or oil
26 products from wells, pipelines, or storage tanks. *Id.* Such leaks or spills could impact
27 groundwater aquifers, particularly if they are within 100 feet of the surface and the geology is
28 permeable or connected to a surface water system through existing fractures. *Id.* Impacts to

1 groundwater may occur due to improper well design or poor casing, the transport of fracking
2 fluid from the target strata along natural rock fractures, and the potential opening or extension of
3 existing fractures caused by the pressurized injection of fracking fluid. AR 5847. Fracking also
4 may have impacts on seismic activity. AR 5850. The White Paper explains that Nevada is the
5 third most tectonically active state in the country and that there have been 63 earthquakes with a
6 magnitude of at least 5.5 since the 1850s. *Id.* It also notes that, although seismic activity
7 induced by oil and gas activity is rare in comparison to the overall amount of oil gas
8 development activity, such activity is likely to have caused seismic activity in 13 states,
9 including Nevada. *Id.* A study by the National Academy of Sciences conducted in 2012 found
10 that fracking does not pose a high risk of seismic events. *Id.* BLM expressly stated that an
11 analysis of the potential for drilling at particular sites leading to seismic activity would be
12 analyzed when BLM considers applications for permits to drill. *Id.*

13 Despite BLM’s analysis of fracking and the potential environmental impacts of fracking,
14 Plaintiffs claim that the analysis in the EA was insufficient. Their primary argument is that BLM
15 was not permitted to rely on the White Paper because it was not a NEPA document. *See* Pls.
16 Mem. at 30. But Plaintiffs are incorrect that BLM may not rely on the White Paper to meet its
17 obligations under NEPA. CEQ’s regulations expressly allow agencies to incorporate documents
18 by reference. *See* 40 C.F.R. § 1502.21. The regulations merely require that “[t]he incorporate
19 material be cited in the [NEPA document] and its content briefly described.” *Id.* BLM clearly
20 did so. AR 5679. Moreover, the objection to reliance on the White Paper is particular
21 unfounded here given that it was drafted by BLM—in other words, BLM was not relying on the
22 analysis of another entity.

23 Plaintiffs argue that the circumstances here are similar to those in *Kern v. U.S. Bureau of*
24 *Land Management*, 284 F.3d 1062 (9th Cir. 2002), but that is not the case. In *Kern*, the plaintiffs
25 challenged a resource management plan and argued that the EIS for the plan did not sufficiently
26 analyze the impacts of fungus on a type of cedar. *See id.* at 1071-72. The EIS contained
27 virtually no analysis of the impacts of the fungus and instead referred to previously prepared
28 guidance that was not subject to NEPA review. *Id.* at 1067-68. Under those circumstances,

1 where the EIS contained virtually no discussion of impacts caused by the fungus and merely
2 referred to previously issued guidance, BLM could not rely on tiering to the guidance to satisfy
3 its NEPA obligations. *Id.* at 1073. But the circumstances are different here because BLM is not
4 “tiering” within the meaning of 40 C.F.R. § 1508.28; instead, it is incorporating by reference a
5 document that it prepared for the EA at issue here. The White Paper is an appendix to the EA
6 and, as such, was available for a public comment period along with the draft EA. *See* AR 5671
7 (EA), 63677 (draft EA). And the public, including the Center for Biological Diversity, submitted
8 comments regarding the analysis of fracking in the EA. AR 5877-78. Accordingly, the problem
9 identified in *Kern*—tiering to a document that never went through a NEPA process—does not
10 apply here.⁷

11 Plaintiffs also argue that the analysis in the EA is insufficient because it is too general.
12 *See* Pls. Mem. at 31 (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208,
13 1213 (9th Cir. 1998). *Blue Mountains* involved the authorization of a timber sale, after which
14 logging can proceed without further approval from the agency. *See* 161 F.3d at 1210. In the
15 context of the approved timber sale, the court found the analysis of the impacts of erosion and
16 increased sediment from logging to be insufficient. *Id.* at 1213.⁸ But an oil and gas lease sale is
17 different. As discussed above, the sale itself does not allow any immediate development to
18 occur; instead, actual development occurs after BLM’s approval of an application for drilling
19 permits—a decision process that is itself subject to additional NEPA analysis. *See* Background,
20 section I.B, *supra*. It is also not known where and when development will occur. *See id.*
21 Therefore, courts have allowed agencies to provide more general NEPA analysis and to defer
22 more detailed, site-specific analyses to a later stage, when BLM is considering whether to
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24 ⁷ In *Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800 (9th Cir. 1999), the court
25 found that the agency had not sufficiently analyzed cumulative impacts and that a prior EIS,
26 which the agency tiered to, did not consider the impacts of the challenged action and therefore
27 could not be relied upon for its analysis of cumulative impacts. *Id.* at 810-11. No such
circumstances are present in this case.

28 ⁸ *Klamath-Siskiyou Wildlands Center*, 387 F.3d 989 (9th Cir. 2004), likewise involved timber
sales, *id.* at 992, and therefore provides no guidance here.

1 approve drilling permits. *See N. Alaska*, 457 F.3d at 977 (“[W]e conclude that the government
2 was not required at this stage to do a parcel by parcel analysis of potential environmental effects.
3 Such effects are currently unidentifiable, because the parcels likely to be affected are not yet
4 known.”).

5 Finally, *Center for Biological Diversity v. Bureau of Land Management*, 937 F. Supp. 2d
6 1140 (N.D. Cal. 2013) is distinguishable. The EA in that case projected that only one
7 exploratory well would be drilled within the lease sale area and contained only a minimal
8 analysis of fracking. *Id.* at 1148. The EA also stated that fracking was “not relevant to analysis
9 of impacts . . . because the reasonable foreseeable development scenario anticipates very little (if
10 any) disturbance to the human environment.” *Id.* (quoting the EA for the lease sale). *Id.* BLM
11 acknowledge that the use of fracking generally in the country had increased, but it refused to
12 analyze the potential impacts of fracking on the area subject to the lease sale, asserting instead
13 that “these issues are outside the scope of this EA because they are not under the authority or
14 within the jurisdiction of the BLM.” *Id.* at 1155-56 (quoting the administrative record). The
15 circumstances of this case are distinguishable because BLM has not refused to analyze the
16 impacts of fracking and has analyzed the potential impacts of fracking to a reasonable degree at
17 the lease sale stage.

18 Accordingly, BLM’s analysis of the potential impacts of fracking complied with NEPA.

19 **C. BLM Did Not Rely on Stale Data in Approving the Lease Sales**

20 BLM conducted an appropriate analysis of potential impacts based on recent information
21 before approving the lease sales, and therefore Plaintiffs’ argument that BLM relied on outdated
22 analyses is without basis. *See* Pls. Mem. at 31-33. While it is true that the Tonopah RMP was
23 issued in 1997 and the Shoshone-Eureka RMP was issued in 1986, *see* AR 4933-5572, 24796-
24 25098, BLM did not simply stand on the analysis in the EISs associated with the RMPs before
25 making a decision to offer the leases at issue. Instead, it conducted additional analysis of more
26 recent information in the EA before making a leasing decision.

27 Plaintiffs argue that the EISs for the Tonopah and Shoshone-Eureka RMPs did not
28 contain a sufficient analysis of the impacts of hydraulic fracturing, impacts to wetlands from the

1 current leases, and impacts to mule deer and its habitat. *See* Pls. Mem. at 32-33. The EA,
2 however, does analyze those issues, and as discussed elsewhere, the analysis in the EA on those
3 subjects is sufficient to comply with NEPA. *See* section I.B, *supra*, sections I.D and II.B, *infra*.
4 The Court should review both the EISs for the RMPs and the lease sale EA to determine
5 whether, taken together, they provide sufficient NEPA coverage. *See W. Watersheds Project v.*
6 *U.S. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1099 (D. Nev. 2011) (“Only where neither
7 the general nor the site-specific documents address significant issues is environmental review
8 rejected.”) (citing *Te-Moak Tribe*, 608 F.3d at 602-07). Because BLM’s EA analyzed the
9 environmental impacts of the lease sale in the EA, BLM complied with NEPA.

10 The cases they cite offer no basis for finding the NEPA analysis for the lease sale to be
11 insufficient. In *Northern Plains Resource Council v. Surface Transportation Board*, 668 F.3d
12 1067 (9th Cir. 2011), the Ninth Circuit found that reliance on ten-year old aerial surveys of
13 wildlife species was insufficient to comply with NEPA. *Id.* at 1086-87. But in that case, the
14 agency had not conducted a more recent EA to update its analysis. Moreover, unlike the
15 approval of the construction of a railroad line in that case, for which there would be no further
16 opportunity for additional NEPA review, here there will be additional site-specific analysis to
17 support BLM’s evaluation of applications for permits to drill before ground-disturbing activity
18 will occur. *See N. Alaska*, 457 F.3d at 977 (“Any later plan for actual exploration will be subject
19 to a period of review before being accepted, rejected or modified by the Secretary.”). *Lands*
20 *Council v. Powell*, 395 F.3d 1019 (9th Cir. 2005) is likewise distinguishable. There, the court
21 found that Forest Service had failed to sufficiently analyze the impacts of a watershed restoration
22 project on a species of trout because the fish count data was six years old. *Id.* at 1031. Just as in
23 *Northern Plains*, however, a more recent NEPA analysis had not been done and there would be
24 no additional opportunity for NEPA review before the project was carried out. *See id.* at 1024-
25 25.⁹

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28 ⁹ *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846 (9th Cir. 2005) merely states
NEPA’s “hard look” standard. *See id.* at 864.

1 In an effort to discredit BLM’s analysis, Plaintiffs again mischaracterize the EA. They
 2 claim that BLM admits that supplemental analysis of impacts was required. *See* Pls. Mem. at 33
 3 (quoting AR 5666). But what the EA says is: “The oil and gas parcels addressed in this EA
 4 cannot be considered for leasing without supplemental analysis of new information and changes
 5 in environmental conditions since these RMPs were approved” AR 5666. That analysis
 6 was done in the EA. Once again twisting the language of the EA, Plaintiffs argue that BLM
 7 admits that the lease areas are “not adequately protected under either or both [RMPs].” Pls.
 8 Mem. at 33 (quoting AR 5674). Plaintiffs quote from a section of the EA discussing the partial
 9 deferred alternative, which proposes deferral pending the development of stipulations “that
 10 would address resources that are not adequately addressed in the RMPs.” AR 5674. The EA
 11 does not say that all resources are not adequately protected, as Plaintiffs imply, and, as discussed
 12 below, the analysis of mitigation in the EA satisfied NEPA.

13 Accordingly, the Plaintiffs have failed to demonstrate that BLM has failed to sufficiently
 14 analyze the impacts of its leasing decision.

15 **D. BLM Appropriately Assessed Mitigation Measures for Mule Deer and**
 16 **Pronghorn Antelope in Compliance With NEPA, and the Mitigation**
 17 **Measures Will Avoid Significant Impacts to Those Species**

18 BLM appropriately analyzed mitigation measures to protect mule deer and pronghorn
 19 antelope, in full compliance with NEPA. Specifically, BLM evaluated the scientific literature
 20 and required stipulations to protect mule deer and pronghorn antelope from significant
 21 environmental impacts. Plaintiffs have failed to demonstrate that the analysis was inadequate,
 22 and they also have failed to show that the mitigation measures will be inadequate to avoid
 23 significant impacts to mule deer and pronghorn.

24 NEPA requires only that mitigation be developed and analyzed to a reasonable degree.
 25 *Robertson*, 490 U.S. at 357-58; *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army*
 26 *Corps of Eng’rs*, 524 F.3d 938, 950 (9th Cir. 2008); *see also Wetlands Action Network v. U.S.*
 27 *Army Corps of Eng’rs*, 222 F.3d 1105, 1121-22 (9th Cir. 2000), *abrogated on other grounds by*
 28 *Wilderness Soc. v. U.S. Forest Serv.*, 630 F.3d 1173 (9th Cir. 2011). In order to meet the
 requirements of NEPA, “mitigation must be discussed in sufficient detail to ensure that

1 environmental consequences have been fairly evaluated.” *City of Carmel-by-the-Sea v. U.S.*
2 *Dep’t of Transp.*, 123 F.3d 1142, 1154 (9th Cir. 1997) (internal quotations and citation omitted).
3 While CEQ’s NEPA regulations specifically require an EIS to separately discuss mitigation, *see*
4 40 C.F.R. §§ 1502.14(f), 1502.16(h), there is no corresponding provision for EAs. *See* 40 C.F.R.
5 § 1508.9 (defining “environmental assessment.”). Indeed, while an EA may discuss mitigation,
6 there is no requirement that it do so at all. *Akiak Native Cmty. v. U.S. Postal Serv.*, 213 F.3d
7 1140, 1147 (9th Cir. 2000).

8 An agency may employ mitigation to reduce or offset the effects of an action to below a
9 significant level and properly make a finding of no significant impacts. *See, e.g., Wetlands*
10 *Action Network*, 222 F.3d at 1121 (“In evaluating the sufficiency of mitigation measures, we
11 focus on whether the mitigation measures constitute an adequate buffer against the negative
12 impacts that result from the authorized activity to render such impacts so minor as to not warrant
13 an EIS.”); *see also Greenpeace Action v. Franklin*, 14 F.3d 1324, 1333 (9th Cir. 1993); *Nat’l*
14 *Parks and Conservation Ass’n v. Babbitt*, 241 F.3d 722, 733-34 (9th Cir. 2001). An agency may
15 find “that the mitigation measures would render any environmental impact resulting from the
16 [action] insignificant.” *Wetlands Action Network*, 222 F.3d at 1122. Similarly, an agency may
17 incorporate mitigation into the project design so that significant impacts are avoided, rather than
18 mitigated after the project is developed. *See Env’tl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d
19 1005, 1015 (9th Cir. 2006).

20 Here, BLM sufficiently analyzed mitigation in compliance with NEPA. The EA explains
21 that pronghorn and mule deer are found in the lease area. AR 5711. The EA further explains
22 that pronghorn and mule deer may be impacted by development activities, and that in order to
23 avoid such impacts, if there were proposals to develop particular leased parcels, “additional site-
24 specific mitigation measures and [best management practices] would be included in the proposal
25 or attached as [conditions of approval] for each proposed activity, which would be analyzed
26 under their own additional site-specific NEPA analysis with consultation with NDOW and
27 [FWS].” AR 5713. Further, BLM required a lease stipulation to protect mule deer, which is
28 listed in Appendix B to the EA. AR 5713-14, 5792. The stipulation prohibits all surface activity

1 from January 15 through May 15. AR 5792. The geographic boundaries of the timing limitation
2 may only be modified if the authorized BLM officer, after consultation with NDOW, determines
3 that the area no longer contains mule deer winter habitat or that the action would not harm mule
4 deer or its habitat. *Id.* The dates of the timing restriction may only be modified if new
5 information becomes available demonstrating that the dates for mule deer winter habitat are
6 inaccurate with respect to a particular lease parcel. *Id.*

7 BLM also analyzed alternative mitigation to protect mule deer and pronghorn. In one
8 alternative, 104,668 acres would have been deferred to avoid the disturbing wildlife. AR 5716.
9 In another alternative, which was later adopted, BLM analyzed additional protections for
10 wildlife, which included new stipulations to protect mule deer and pronghorn. *Id.*; *see also* AR
11 1531 (FONSI referring to the Additional Resource Protection Alternative); AR 5648 (June 2017
12 decision record referring to stipulations in the EA). The stipulations associated with the
13 Additional Resource Protection Alternative are described in Appendix C.2. to the EA. AR 5820-
14 33. As to mule deer, the new stipulation makes an additional 11 parcels subject to the January to
15 May timing restriction and also requires a notice for 45 parcels that surface activities may be
16 restricted between November 1 and April 30 to protect deer migration corridors. AR 5822-25.
17 As to pronghorn, the new stipulation places a timing restriction on parcels with pronghorn
18 habitat that prohibits surface activity from November 1 through April 30. AR 5821.

19 BLM's analysis of mitigation more than satisfied its procedural obligations under NEPA,
20 and the measures BLM ultimately adopted will avoid significant impacts to mule deer and
21 pronghorn that development on the leases otherwise may have caused. Plaintiffs' arguments are
22 belied by the record and contrary to the applicable case law. For example, Plaintiffs point to a
23 December 8, 2016 e-mail from NDOW recommending that certain parcels be deferred pending a
24 remapping of mule deer summer and winter habitat by NDOW. AR 6642. But BLM was not
25 required by NEPA to adopt any specific mitigation measures, including the deferral of lease
26 parcels. *See Robertson*, 490 U.S. at 353 ("[I]t would be inconsistent with NEPA's reliance on
27 procedural mechanisms—as opposed to substantive, result-based standards—to demand that
28 presence of a fully developed plan that will mitigate environmental harm before an agency can

act.”). Furthermore, NDOW later revised its request and recommended instead that timing restrictions be placed on certain parcels to protect crucial winter habitat for mule deer and pronghorn and to protect mule deer migration corridors. AR 6644-45 (NDOW February 2, 2017 letter), 19150-51 (NDOW February 27, 2017 e-mail). And, as the record demonstrates, BLM ultimately adopted seasonal protections as recommended by NDOW. The record also explains that BLM can impose appropriate conditions of approval on drilling permits as necessary to avoid or mitigate impacts to mule deer and pronghorn if and when lessees seek permission for such drilling activities. AR 5713. By adopting stipulations to protect mule deer and pronghorn seasonal habitat, based on input from NDOW, and through its ongoing regulatory authority at the drilling permit stage, BLM has more than adequately demonstrated that significant impacts to mule deer and pronghorn will be avoided and the issuance of FONSI was justified. *See Env'tl. Prot. Info. Ctr.*, 451 F.3d at 1015-16 (finding that the Forest Service had taken the requisite “hard look” under NEPA by incorporating mitigation measures into a timber project and upholding the agency’s FONSI).

Plaintiffs, nevertheless, insist that the timing restriction on surface activities in mule deer winter habitat is inadequate to avoid significant environmental impacts. *See* Pls. Mem. at 34-35. Relying on a report prepared by the Wyoming Game and Fish Department (“WGFD”), titled *Recommendations for Development of Oil and Gas Resources Within Important Wildlife Habitats* (April 2010), AR 59216, Plaintiffs point out that WGFD recommends that oil and gas development not exceed one well pad per square mile within crucial mule deer winter habitat. AR 59248. Well placement, however, is more appropriately addressed if and when a lessee seeks a permit to drill, at which point BLM will have ample regulatory authority and discretion to impose additional protections as may prove necessary. *See* 43 C.F.R. § 3101.1-2 (authorizing BLM to require “reasonable measures . . . to minimize adverse impacts to other resource values”). The WGFD also recommends certain habitat treatments but, here again, these would be specific to particular locations and BLM retains discretion and authority to address those needs at the drilling permit stage, as necessary. AR 59249. Finally, the WGFD recommends a seasonal restriction from November 15 through April 30, during which activities would be

1 minimized, AR 59248, but the Nevada lease sales already contain a similar stipulation
2 prohibiting all surface activity from January 15 through May 15. AR 5792. In short, Plaintiffs
3 have failed to demonstrate that BLM's stipulations for the Nevada lease sales are inconsistent
4 with the WGFD's recommendations. Moreover, none of the parcels sold competitively at the
5 June or September lease sales contained mule deer habitat.

6 Plaintiffs also cite other studies regarding the effects of oil and gas development on mule
7 deer. *See* AR 60776-89, 60852-81. In one study, the researchers found that increases in
8 residential and oil and gas development had a negative impact on mule deer populations. AR
9 60787. Another study found that mule deer tend to avoid drilling well pads. AR 60859-60. But
10 the study recognized that avoidance of drilling in the winter months could mitigate impacts to
11 mule deer, AR 60860, and an existing stipulation already prohibits drilling in crucial mule deer
12 habitat during the winter. AR 5822-23. The study also recommended lower densities of drilling
13 pads, AR 60860, but here again, BLM can address the spacing of well pads and develop further
14 mitigation to address the impacts of drilling and related infrastructure when it receives
15 applications for permit to drill. AR 5713. *See also* Pls. Mem. at 35 (citing AR 61002) (relying
16 on second study for proposition that mule deer avoid drilling infrastructure and may have
17 reduced abundance during drilling periods, but ignoring existing stipulations and BLM's ongoing
18 regulatory authority at the permitting stage).

19 Plaintiffs argue that BLM's obligation to take a "hard look" at impacts to mule deer
20 required it to analyze more specific stipulations that would apply to site-specific oil and gas
21 development. Pls. Mem. at 36 (citing *Richardson*, 565 F.3d at 718). Plaintiffs once again mis-
22 read the case law. In *Richardson*, the Tenth Circuit cited with approval the Ninth Circuit's ruling
23 in *Northern Alaska* finding that environmental analysis of oil and gas development was not
24 required "when environmental impacts were unidentifiable until exploration narrowed the range
25 of likely drilling sites"). *Richardson*, 565 F.3d at 718 (citing *N. Alaska*, 457 F.3d at 977-78).
26 The Tenth Circuit went on to explain that, in *Richardson*, "[c]onsiderable exploration [had]
27 already occurred on parcels adjacent to [the leased parcel]" and the record revealed that the
28 lessee had "concrete plans to build approximately 30 wells" on the leased parcel. *Id.* at 718.

1 That is in stark contrast to this case where no drilling plans were before BLM at the time it
 2 decided to offer the parcels for leasing. Because there were no such plans, an analysis of
 3 mitigation for site-specific development plans was not required here.¹⁰ Accordingly, Plaintiffs
 4 have failed to demonstrate that the analysis of impact to mule deer and pronghorn and measures
 5 to mitigate those impacts at the lease stage was insufficient to comply with NEPA.

6 Plaintiffs separately argue that the timing restriction in mule deer winter habitat will not,
 7 in fact, avoid impacts to big game. Pls. Mem. at 42. More specifically, they seize on BLM's
 8 conclusion that the timing restriction on surface use during the winter months in mule deer
 9 habitat will not "avoid all adverse effects to big game species and habitat." *Id.* That, however, is
 10 not the standard. As discussed above, BLM has reasonably developed and analyzed mitigation
 11 to ensure that significant impacts to big game species, including mule deer and pronghorn, will
 12 be avoided. *See Envtl. Prot. Info. Ctr.*, 451 F.3d at 1015; *Wetlands Action Network*, 222 F.3d at
 13 1122.¹¹ That satisfies NEPA, and provides adequate grounds for BLM's FONSI.

14 Accordingly, Plaintiffs have failed to demonstrate that BLM's analysis of mitigation
 15 measures for mule deer and pronghorn violated NEPA.

16 **II. BLM's Conclusion that Lease Stipulation Will Avoid Significant Impacts to Water** 17 **Resources Was Neither Arbitrary Nor Capricious**

18 Plaintiffs assail BLM's conclusion that certain stipulations protecting surface and ground
 19 water would reduce and mitigate the impacts of fluid mineral development, arguing, despite
 20 abundant record evidence to the contrary, that these stipulations "do not protect" the resources.

21
 22 ¹⁰ Plaintiffs fail to explain why the Ninth Circuit's ruling regarding cumulative impacts in
 23 *Muckleshoot Indian Tribe*, 177 F.3d at 811, is relevant here. And while the Ninth Circuit has
 24 required agencies to provide an assessment of the effectiveness of mitigation measures in an EIS,
 25 *see South Fork Band Council of Western Shoshone of Nevada v. U.S. Department of the Interior*,
 588 F.3d 718, 727 (9th Cir. 2009), it has not required the same for EAs.

26 ¹¹ *Wetlands Action Network* does not support Plaintiffs' arguments. *See* 222 F.3d at 1121-22
 27 (upholding the Corps' analysis of mitigation and a FONSI). Plaintiffs have failed to explain how
 28 *Save the Yaak Committee v. Block*, 840 F.2d 714 (9th Cir. 1988) is relevant here. The central
 issue in that case—whether the Forest Service was required to analyze the impacts of timber
 sales along with the impacts of constructing a road to facilitate timber harvest, *id.* at 719-20—is
 not present in this case.

Pls. Mem. at 36. This is patently incorrect. As explained in the two subsections that follow, BLM appropriately examined impacts to water resources and the expected effects of associated protective measures and it reasonably concluded that significant impacts would be avoided. Plaintiffs' contentions to the contrary lack merit.

A. The Record Reflects a Thorough Consideration of Impacts and Protective Measures

BLM's assessment of impacts to water resources is reflected principally in three documents: (i) the Final EIS for the Tonopah RMP (AR 4953)¹² (ii) the EA for the June 2017 lease sale (AR 5651), and (iii) the water resources stipulation, No. NV-B-10-B-CSSSU, which BLM applied to leased parcels containing significant water resources, including rivers, streams, flood plains, playas, wetlands, springs, and seeps. AR 5827.

The Tonopah RMP designated as "open to fluid mineral leasing" approximately 5.4 million acres of public land. AR 4994. It imposed seasonal restrictions on leasing activities on 72,400 acres of seasonal wildlife habitat and imposed non-surface occupancy stipulations on 50,245 acres. *Id.* In Chapter 4 of the FEIS supporting the RMP, BLM examined environmental impacts of activities and uses "in terms of change which could occur" if the RMP were adopted. AR 5037. This included examination of impacts to a wide range of resources, including air and water, wildlife, vegetation, riparian habitats, and cultural resources, as well as impacts to known uses of the affected lands, including recreation, livestock grazing, development of locatable and fluid minerals, and development of rights-of-way and utility corridors.

As relevant here, the EIS includes sections specifically dedicated to watersheds, vegetation, riparian habitats, and wildlife habitats, among other things. With respect to

¹² The leased parcels at issue in this case are located in both the Tonopah and Shoshone-Eureka RMP planning areas. AR 5661. The Shoshone-Eureka Final EIS provided that "[a]ll areas designated by the BLM as prospectively valuable for oil and gas will be open to leasing except as modified by other resources," AR 24960, although it did not address fluid mineral leasing in the detail of the Tonopah EIS due to lack of interest in such leasing at the time. The RMPs for these two planning areas are currently undergoing revision and will be replaced by a single EIS for the Battle Mountain District. AR 5674.

1 watersheds, the EIS considered and disclosed that fluid mineral development would cause “short
2 term loss of soil cover, and a subsequent increase in erosion potential.” AR 5038. It also
3 considered and disclosed that soil compaction “would occur wherever vehicle use is
4 concentrated.” *Id.* In addition, the EIS explained that most long-term impacts of fluid mineral
5 development would be “reduced or eliminated by minimizing disturbed areas, using best-
6 available construction techniques [and] by mitigating disturbance through soil stabilization and
7 revegetation.” *Id.* Importantly, such controls are best designed and implemented not at the land
8 use planning or leasing stage, but at the permitting stage, when, and if, lessees have sought
9 authorization to proceed with fluid mineral development and when the agency has before it
10 specific lease-development proposals that can be meaningfully evaluated and adjusted as
11 necessary to protect resources.

12 As to vegetation, the EIS considered and disclosed that oil and gas development would
13 produce short term impacts from surface-disturbing activities, including increased soil erosion,
14 small losses in forage, and visual impacts. It noted, in addition, that reclamation and
15 revegetation were expected to minimize these effects. AR 5040. With respect to wildlife, the
16 EIS explained that adverse impacts could be expected, including habitat fragmentation due to
17 road construction and other forms of habitat degradation, as well as harassment of species, noting
18 however that seasonal restrictions would minimize impacts. AR 5042. With respect to riparian
19 habitats, the EIS noted that just 29% of the identified riparian zones are in areas deemed to have
20 high potential for fluid mineral development, while 40% are in areas deemed to have low
21 potential. AR 5046. It indicated that development “along these streams” would cause adverse
22 impacts, but that these zones would be “given protection by the standard terms and conditions
23 applied to leasable minerals” and by the use of “no-surface occupancy stipulations” in designated
24 areas. AR 5045-5046.¹³

25
26
27 ¹³ See also AR 5791-5807 (Appendix B to the June 2017 EA, reflecting the standard stipulations
28 and lease notices as of 2017), AR 5808-5819 (Appendix C.1, reflecting the no-surface-
occupancy stipulations and controlled surface use stipulations that would apply to the Partial
Deferral Alternative).

1 The protections noted in the EIS were enhanced in this case by application of the water
2 resources stipulation to portions of specified parcels, as more fully discussed below. Before
3 turning to these, Federal Defendants first address the impacts considered in the EA for the June
4 2017 lease sale. As an initial matter, the EA was based on “current resource and land use
5 information and the management framework developed in the [governing RMPS]” which were
6 supported by the Tonopah and Shoshone-Eureka EISs. The EA was prepared following an
7 “assessment of potential environmental impacts” by an “interdisciplinary team . . . of resource
8 specialists.” AR 5659. The team considered “historical data and personal knowledge of the
9 areas involved, conducted field inspections, and reviewed existing databases and file information
10 to assess potential effects, and whether parcels should be eliminated from leasing.” *Id.*

11 In the draft EA, the agency examined three alternatives: the proposed action (leasing all
12 proposed parcels), no action (leasing none), and the Partial Deferral alternative, under which
13 parcels with important water or other resources would be deferred to a future quarterly lease sale,
14 to allow time for an “RMP update [which] would provide new stipulations.” *Id.* These parcels
15 totaled approximately 105,000 acres. After further consideration, the agency added a fourth
16 alternative to the EA—the Resource Protection alternative. AR 5659.

17 As the EA explained, the Resource Protection alternative would allow BLM to avoid
18 deferral of parcels through application of new protective stipulations, including the water
19 resources stipulation and a stipulation for parcels with slopes greater than 30%. AR 5702; *see*
20 *also* AR 5820-5833 (Appendix C.2, reflecting new timing limitation stipulations and new
21 controlled surface use stipulations that would apply under the Resource Protection alternative).
22 The water resources stipulation included in Appendix C.2 was applied to parcels totaling 58,000
23 acres, while the stipulation for slopes greater than 30% was applied to parcels totaling 72,000
24 acres. *Id.*

25 The EA reflects BLM’s recognition that surface and ground water are fundamental
26 components of ecosystem health, particularly in the arid and semi-arid Battle Mountain District,
27 _____
28

1 AR 5697, and that the springs, seeps, wetlands and perennial springs “form literal oases that
2 support all life and encourage biodiversity.” *Id.* These water resources, BLM explained, “play
3 an important role in wildlife habitat and in the food chain for wildlife taxa,” supporting both
4 resident and migratory species. *Id.* The agency also noted that riparian and wetland areas “are
5 the most productive and important ecosystems” in BLM’s Battle Mountain District.

6 The EA’s recognition and disclosure of the importance of these water resources was
7 balanced by an equal emphasis on impacts to these resources and the mitigation and project
8 controls intended to promote their long-term protection. The EA noted possible long- and short-
9 term alterations to the hydrologic regime “depending on the location and intensity of
10 development,” and the fact that clearing, grading and soil stockpiling can alter “overland flow
11 and natural groundwater recharge patterns.” AR 5699. BLM also noted that “several of the
12 proposed lease parcels . . . largely or entirely overlay a combination of water bodies,” such that it
13 would be “difficult or impossible to avoid impacts to these hydrological features and their
14 associated plant and wildlife habitats.” *Id.* It added, however, that BLM can “move a proposed
15 well site up to 200 meters at its discretion to mitigate impacts,” and further that the “Clean Water
16 Act may necessitate relocating the well further.” *Id.*

17 Finally, and most importantly, significant additional protections are afforded by the new
18 water resources stipulation, which were applied to some or all of 43 of the offered parcels. AR
19 5827. The stipulation “avoid[s] impacts” to identified 100-year flood plains and playas; to areas
20 within 500 feet of perennial waters, springs, wells, wetlands, and riparian areas, on either side;
21 and to areas within 100 feet of the inner gorge of ephemeral channels, also on either side. AR
22 5827. They also provide that “[s]urface disturbing activities may require special engineering
23 design, construction and implementation measures, potentially including relocation of operations
24 more than 200 meters to protect water resources.” *Id.* Although, as Plaintiffs point out,
25 exceptions are possible, the stipulations make clear that BLM may only grant exceptions (1) “if
26 an environmental review determines that the action, as proposed or otherwise restricted, *does not*
27 *affect* the resource, or could be conditioned so as to not negatively impact the water resources
28 identified;” and (2) in circumstances where areas cannot be avoided, if BLM requires that

1 “engineering, best management practices, [or] design considerations are implemented to mitigate
2 impacts to water resources.” *id.* (emphasis added). *Id.* Exceptions are also allowed for
3 environmentally beneficial actions, such as those “designed to enhance the long-term utility or
4 availability of the riparian habitat.” *Id.*¹⁴

5 How the stipulations would ultimately operate in a given site-specific setting could not be
6 meaningfully determined at the leasing stage, because it was unknown, at the time of the leasing
7 decision and prior to the lease sale: (1) what parcels would be sold, (2) whether development of
8 parcels sold would ultimately be pursued; and (3) if development is pursued, how the lessee
9 would propose to proceed. These considerations only serve to underscore the lack of merit in
10 Plaintiffs’ specific objections, as discussed below.

11 **B. Plaintiffs’ Contention That the Stipulations Do Not Protect Wetlands Lacks**
12 **Merit**

13 As discussed, BLM dutifully examined and disclosed in the EA numerous adverse
14 impacts to water resources, but it also explained why conditions, stipulations, best management
15 and engineering practices, and the exercise of agency discretion and technical expertise at the
16 permitting stage (*i.e.*, upon BLM receipt of APDs) would minimize or eliminate those impacts.
17 Plaintiffs’ arguments concerning water resources, on the other hand, focus almost exclusively on
18 the impacts, while ignoring the protective measures. They argue, based on a hand-selected set of
19 adverse impacts that suit them, that the challenged decision must therefore be arbitrary. The
20 Court should reject these hollow contentions.

23
24 ¹⁴ Waiver of stipulations is also permissible, but only upon BLM approval of a site-specific study
25 “by a qualified hydrologist or engineer” finding that certain rigorous conditions are met,
26 including that: “the areas proposed for surface occupancy after construction would: 1) pass the
27 10-year peak flow event without erosion, 2) pass the 25-year peak flow without failed
28 infrastructure, 3) pass the 50-year peak flow event without failure (when surface occupancy is
planned for greater than 50 years), 4) not impede 100-year peak flow events, 5) not negatively
impact springs or wells, and 6) any wetlands impacted could be restored to their original function
post occupancy.” AR 5827.

1 Plaintiffs' argument that the water resources stipulation "fails to adequately protect those
2 resources because of its limited nature and possible exceptions," Pls. Mem. at 36, lacks merit for
3 various reasons. First, the stipulation is not "limited" in nature, as the discussion above, and the
4 record itself, demonstrate. As noted, the stipulation imposes a 1,000-foot protective buffer
5 surrounding perennial waters, springs, wells, wetlands, and riparian areas (*i.e.*, 500 feet on either
6 side), and a 200-foot buffer around ephemeral channels (*i.e.*, 100 feet on either side). As the EA
7 explained, "application of the stipulation would generally protect water resources from all
8 impacts." AR 5702. Second, the fact that the stipulation allows for exceptions does not mean it
9 is not protective, nor does it justify an order vacating the challenged decision *at the leasing*
10 *stage*. Plaintiffs essentially ask the Court to anticipate that exceptions would be allowed
11 indiscriminately or inappropriately at the APD stage, should the parcels containing these
12 resources be leased and development authorization sought. The Court should not assume that
13 BLM's course, at the APD stage, would be to disregard its stated intention to apply technical
14 expertise and judgment in protecting water resources. BLM clearly recognizes that these
15 resources, which represent "less than one percent" of the total area offered for sale, AR 5698, are
16 vital elements of the ecologic system and worthy of protection. Plaintiffs offer no valid reason to
17 upset this plan at the leasing stage, through an order vacating the decision and voiding the leases.
18 Further environmental analysis will occur at the permitting stage, in which opportunities for
19 public participation will afford Plaintiffs ample opportunity to challenge any permitting decision
20 that they believe improperly applies, or makes exception to, the water resources stipulation.

21 Plaintiffs also contend that the Court should vacate the decision and void the leases
22 because the stipulation has not been applied to all parcels, thus rendering the FONSI
23 unsupported, but the record does not support this extreme course. The purpose of the Resource
24 Protection alternative was to protect the parcels that would have been deferred under the Partial
25 Deferral alternative (encompassing 105,000 acres or approximately 53% of the "original
26 nominated acreage," AR 5674), not to apply the stipulation to all parcels. To this end, the
27 Resource Protection alternative called for application of various new stipulations to parcels
28 encompassing 130,000 acres. *See* AR 5702 (applying the new water resources stipulation to

1 approximately 58,000 acres); *id.* (applying the new stipulation for slopes greater than 30% to
2 approximately 72,000 acres). *Id.* Plaintiffs' criticism of the FONSI is unsupported, and contrary
3 to BLM's reasonable conclusion that the leasing decision would not cause significant impacts
4 and that further site-specific analysis would occur at the APD stage. Plaintiffs inappropriately
5 ignore the nature and purpose of the three-stage oil and gas development process.

6 Finally, Plaintiffs' reliance on *South Fork Band Council of Western Shoshone of Nevada*
7 *v. Department of the Interior (South Fork Band)*, 588 F.3d 718 (9th Cir. 2009) is unavailing.
8 That case involved a challenge to approval of a gold-mining and ore-processing operation that
9 would result in creation of an 850-acre mining pit, in a complex hydrologic zone, that would
10 need to be continuously dewatered over the ten-year life of the mine. The Ninth Circuit reversed
11 the District Court's conclusion that plaintiffs were unlikely to succeed on the merits of one of
12 their NEPA claims. In particular, the Ninth Circuit faulted the agency for not discussing the
13 effectiveness of mitigation measures for the mine dewatering activities, explaining that an
14 "essential component of a reasonably complete mitigation discussion is an assessment of whether
15 the proposed mitigation measures can be effective." *Id.* at 727. It found inadequate the
16 agency's statement that "[f]easibility and success of mitigation would depend on site-specific
17 conditions and details of the mitigation plan" and noted that "[n]othing whatsoever is said about
18 whether the anticipated harms could be avoided by any of the listed mitigation measures." *Id.*
19 The holding is inapposite here because Plaintiffs do not contend that BLM failed to assess the
20 effectiveness of mitigation measures. More importantly, the objective in this case is to
21 meticulously avoid hydrologic zones, through a process that allows BLM to control the
22 placement of well pads and other infrastructure. The objective in *South Fork Band* was to
23 construct the mining pit in the hydrologic zones, where the gold ore was located.

24 BLM's decision to authorize the lease sale was well reasoned and fulfills NEPA's twin
25 objectives of informed decision making and informed public participation. Plaintiffs' arguments
26 to the contrary should be rejected.

1 **III. BLM Was Not Required to Prepare an Environmental Impact Statement for the**
 2 **Lease Sales**

3 BLM was not required to prepare an EIS for the lease sales. Plaintiffs' argue that an
 4 evaluation of the significance factors, as well as the Ninth Circuit's decision in *Conner*, required
 5 an EIS at the lease sale stage. Neither argument has merit.

6 **A. BLM Reasonably Concluded that the Significance Factors Did Not Mandate**
 7 **the Preparation of an Environmental Impact Statement**

8 BLM's conclusion that the issuance of the leases would not cause significant impacts was
 9 reasonable. In reaching this conclusion, BLM was not required to show that no harm to the
 10 environment would occur, but only that the harm would not be significant. *Anderson v. Evans*,
 11 371 F.3d 475, 489 (9th Cir. 2004). CEQ's NEPA regulations establish factors that an agency
 12 should consider in determining whether the environmental impacts of an action will be
 13 significant. *See* 40 C.F.R. § 1508.27. In the FONSI, BLM reasonably explained that the
 14 expected development of approximately 25 wells over the lifetime of the leases would not result
 15 in widespread environmental impacts. AR 1532. Plaintiffs, nevertheless, claim that three of the
 16 significance factors demonstrate that an EIS was required. In fact, they do not, and each is
 17 addressed below.

18 *Effects on wetlands and ecologically critical areas.* As discussed in section II, *supra*, the
 19 water resources stipulation is sufficient to protect against significant impacts and has been
 20 applied to the appropriate parcels, including parcels containing "spring mounds" which by
 21 themselves, according to Plaintiffs, provide sufficient reason to prepare an EIS. Pls. Mem. at 44.
 22 The stipulation would impose a 500-foot buffer around these rare hydrologic features—features
 23 BLM plainly recognized as worthy of protection. AR 5698 (noting that "preservation for the
 24 purpose of future study to facilitate proper management is essential"). In addition, impacts from
 25 the use of hydraulic fracturing will be mitigated using a number of methods, including the
 26 sealing of wellbores, the recovery of fracking fluid, and disposing of fracking fluids through
 27 underground injection, treatment and reuse, or other methods, as well as through mitigation
 28 measures required by the State of Nevada. AR 5679-80; *see* section I.B, *supra*. Given the

1 stipulations in place to protect resources and that BLM has the authority to impose conditions of
 2 approval when issuing drilling permits, BLM reasonably concluded that impacts to the
 3 environment would not be significant. *See Wetlands Action Network*, 222 F.3d at 1122
 4 (upholding a FONSI for a Corps Permit).

5 *Controversy.* Plaintiffs claim that the lease sales are “highly controversial.” *See* 40
 6 C.F.R. § 1508.27(b)(4). An action is highly controversial if there is a “substantial dispute
 7 [about] the size, nature, or effect of the major Federal action rather than the existence of
 8 opposition to a use.” *Blue Mountains Diversity Project*, 161 F.3d at 1212 (citation omitted). The
 9 fact that some groups oppose an action does not make it highly controversial; rather, there must
 10 be an “outpouring of public protest” in order for this factor to apply. *Nat’l Parks Conservation*
 11 *Ass’n*, 241 F.3d at 736 (quoting *Greenpeace Action*, 14 F.3d at 1334. The action here is not
 12 highly controversial. BLM received about a dozen comment letters on the EA, most of them
 13 from state and federal agencies. AR 5871.¹⁵

14 Plaintiffs note that NDOW submitted a comment letter expressing concerns about parcel
 15 66 (which was not sold). AR 6645; *see also* AR 19140 (noting similar Fish and Wildlife Service
 16 comments). Both comments noted possible impacts to the Fish Creek Springs Tui Chub.
 17 However the comments were transmitted long before the water resources stipulation had been
 18 developed and included in the Resource Protection alternative, *see* AR 1531, 5647-48, and
 19 Plaintiffs neglect to advise the Court that these comments were made not on the final EA, but on
 20 the draft EA. *See* AR 5873-74 (EA, App. H, addressing the comments from NDOW and FWS
 21 regarding the tui chub). Moreover, these can hardly be characterized as presenting a “substantial
 22 dispute” about the effect of the leasing decision. The same is true with NDOW’s comments on
 23 parcel 106, *see* AR 18754, sent four days later, which noted that the stipulations required by the
 24 governing RMPs do not provide adequate protection to the Railroad Valley Tui Chub. BLM
 25 clearly recognized the inadequacy of RMP stipulations, which is precisely why it proposed
 26

27 ¹⁵ BLM also received 8,000 form letters or e-mails sent from the WildEarth Guardians website.
 28 AR 5871.

1 deferral of these tracts in the draft EA, and why it later imposed the restrictions of water
2 resources stipulation on these parcels, through selection of the Resource Protection alternative.
3 AR 1531, 5647-48.

4 BLM also received only a handful of protest letters regarding the June lease sale, all from
5 environmental advocacy groups. *See* AR 1196-1267, 1268-1311, 25570-77. This degree of
6 opposition does not render an action highly controversial. *See Cold Mountain v. Garber*, 375
7 F.3d 884, 893 (9th Cir. 2004) (“[T]he existence of opposition does not automatically render a
8 project controversial.”). This is simply not a case in which the agency “received numerous
9 responses from conservationists, biologists, and other knowledgeable individuals, all highly
10 critical of the EA.” *Found. For N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1182
11 (9th Cir. 1982). In fact, NDOW stated that it “appreciate[d] that the majority of [its] scoping
12 comments were considered in the EA’s development.” AR 6644. Thus, the decision to issue the
13 leases was not highly controversial.

14 *Highly uncertain or unknown risks.* Contrary to Plaintiffs’ assertions, *see* Pls. Mem. at
15 46, this is not an action that involves uncertain or unknown risks. *See* 40 C.F.R. § 1508.27(b)(5).
16 Plaintiffs claim that the impacts of fracking are uncertain, but as explained in the EA, fracking
17 techniques have been used since 1950. AR 5679. The EA acknowledges that fracking may pose
18 certain risks, but those risks are not unknown. AR 5846-47. These risks can be minimized
19 through the implementation of appropriate conditions at the drilling permit stage. AR 5679-80.
20 Plaintiffs claim that uncertainties regarding the impacts of fracking could be addressed by
21 “insuring that available data are gathered and analyzed.” Pls. Mem. at 46 (quoting *Nat’l Parks &*
22 *Conservation Ass’n*, 241 F.3d at 732). But they do not explain what data could be gathered prior
23 to the development of specific proposals to drill in particular areas on the leaseholds. Likewise,
24 potential impacts to mule deer and pronghorn can be analyzed in more detail and mitigation
25 measures can be developed to avoid and minimize such impacts if development is proposed on
26 parcels with pronghorn or mule deer habitat. But Plaintiffs have failed to demonstrate that it
27 would be useful, at the lease stage, to develop mitigation for impacts that may never occur if
28 development is not proposed in mule deer or pronghorn habitat. Moreover, they have failed to

1 demonstrate that impacts to mule deer or pronghorn from oil and gas development are highly
2 uncertain or carry unknown risks.

3 In sum, Plaintiffs have failed to demonstrate that CEQ's significance factors warrant the
4 preparation of an EIS.

5 **B. BLM Has Complied with Its Obligations Under NEPA Prior to Issuance of**
6 **the Leases that May Result in Surface Disturbance**

7 Plaintiffs are incorrect that BLM was required by the Ninth Circuit's decision in *Conner*
8 to prepare an EIS to support the lease sale. *See* Pls. Mem. at 47. The issue here is not whether a
9 NEPA analysis was required for the lease sale—Defendants agree that it was—but rather the
10 nature of the NEPA analysis that was required. In *Village of Los Ranchos v. Marsh*, 956 F.2d
11 970 (10th Cir. 1992) the Tenth Circuit upheld BLM's issuance of an EA for a lease sale after
12 concluding that the lease sale itself would not have immediate environmental impacts. 956 F.2d
13 at 972-73. And as the Ninth Circuit explained in the *Northern Alaska* case, BLM may prepare
14 appropriate NEPA analyses to support applications for drilling activities. 457 F.3d at 976
15 (“*Conner* is of no assistance to plaintiffs, for we did not discuss the degree of site specificity
16 required in the EIS.”). And while the Ninth Circuit found in *Conner* that an EA and FONSI was
17 insufficient to support a lease sale for the sale of non-NSO leases, *see In re Solerwitz*, 848 F.2d
18 1573, 1848-51 (Fed. Cir. 1988), the circumstances here are different because BLM also is relying
19 on the EISs prepared in conjunction with the Tonopah and Shoshone-Eureka RMPs. *See* AR
20 4953-5379, 24796-25029, 25355-42.

21 Accordingly, Plaintiffs are incorrect that NEPA automatically requires an EIS at the lease
22 sale stage. Certainly, BLM is required to comply with NEPA, but the degree of that obligation
23 depends on the degree of information regarding potential site-specific development that is
24 available at the time of the leasing decision. *Richardson*, 565 F.3d at 717. Here, BLM was
25 unaware of any site-specific development plans at the time of its leasing decision, and therefore
26 there was no obligation to prepare an EIS analyzing such effects. *Northern Alaska*, 457 F.3d at
27 717-18.
28

1 **IV. BLM's Determination of NEPA Adequacy for the September Lease Sale Complied**
 2 **with NEPA**

3 Plaintiffs claim BLM abdicated its NEPA obligations by not performing new NEPA
 4 analysis for the three parcels offered and sold in September 2017. Pls. Mem at 48. This is
 5 incorrect. New NEPA analysis was not required because BLM properly concluded that the
 6 impacts of leasing and developing the three parcels were adequately considered in the EA for the
 7 June 2017 sale. Consistent with its NEPA policy handbook,¹⁶ BLM explained this conclusion in
 8 a "determination of NEPA adequacy" or "DNA." AR 5912-5920. The DNA was posted on
 9 BLM's website on June 7, 2017, and finalized on June 21, 2017, but no comments were
 10 received.

11 It is well settled that when an agency is unable to identify any prior, relevant
 12 environmental analysis, it may either proceed directly to the preparation of an EIS or it may first
 13 prepare an EA, to determine if expected effects of the action are "significant" and thus require
 14 preparation of an EIS. *See* 40 C.F.R. § 1501.4. However, where BLM determines that a
 15 proposed action is "essentially similar to" an earlier action, Ex. 1 at 23, one that has already been
 16 analyzed in an existing NEPA document, then it may prepare a DNA and forego further NEPA
 17 analysis. *See Friends of Animals v. Haugrud*, 236 F. Supp. 3d 131, 132-33 (D.D.C. 2017)
 18 (discussing BLM's NEPA Handbook, H-1790-1). To issue a DNA, the court explained,

19 officials must complete an accompanying worksheet, answering a list of
 20 questions, such as: whether "the geographic and resource conditions are
 21 sufficiently similar to those analyzed in the existing NEPA documents," and
 22 whether "the existing analysis [is] valid in light of any new information or
 23 circumstances."

24 *Id.* at 133 (citing the BLM NEPA Handbook, H-1790-1, at 23). The record demonstrates that
 25 BLM has done so.

26 This court previously considered a challenge to BLM's use of a DNA, in connection with
 27 a 2014 gather of wild horses. In *Friends of Animals v. U.S. Bureau of Land Mgmt.*, No. 3:15-

28 ¹⁶ *See* Ex. 1 (excerpts of BLM's NEPA Handbook, H-1790-1).

1 CV-0057-LRH-WGC, 2015 WL 555980 (D. Nev. Feb. 11, 2015), the Court concluded, on a
2 motion for preliminary injunction, that plaintiffs were likely to succeed on the merits of their
3 challenge. Although the Court concluded that use of a DNA was improper, it did so because the
4 2014 gather and the 2010 gather (for which an EA had been completed) were simply too
5 dissimilar. The Court explained that the 2010 gather was “far narrower in scope than the current
6 proposed roundup” and further that the proposed gather “far exceeds the intensity and scope of
7 what was proposed under the 2010 EA.” *Id.* at *3.

8 Analogous circumstances do not exist here. The September 2017 lease sale involved just
9 three parcels and less than 3,700 acres. It was thus was an action of considerably less “intensity
10 and scope” than the June lease sale, which involved almost 196,000 acres. *Id.* More
11 importantly, BLM appropriately determined in its DNA that the three September parcels were
12 either adjacent to or very near parcel 106, a parcel “specifically considered” in the EA for the
13 June 2017 lease sale. Further, BLM determined that the three September parcels have
14 “geographic and resource conditions that are sufficiently similar, and would be subject to the
15 same stipulations and lease notices” as parcel 106. AR 5913. Plaintiffs make no attempt to
16 identify distinctions between the parcels, or variations in resource conditions, or any other factor
17 that makes analysis of impacts for the June sale different in some meaningful way from those
18 associated with the September sale. Instead, their argument makes a single charge of error: that
19 the DNA is improper because the EA relied upon is inadequate, for reasons stated elsewhere in
20 Plaintiffs’ brief. Pls. Mem. at 48. Because the EA fully satisfies the agency’s NEPA
21 obligations, as demonstrated throughout this brief, Plaintiffs fail to identify any error at all in
22 BLM’s use of a DNA.

23 **V. Even if the Court Finds that A NEPA Violation Occurred, It Should Not Vacate the**
24 **Results of the Lease Sales**

25 If the Court finds that BLM violated NEPA with respect to the June or September 2017
26 lease sales, it should not set aside the lease sales and resulting leases, but instead should suspend
27 the leases. Plaintiffs ask that the EA, FONSI, and DNA be “vacated and remanded.” Pls. Mem.
28 at 49. They do not specifically mention the leases that have been issued, but insofar as the Court

1 deems it necessary to consider those leases, it should not vacate them, as that would be an
2 unnecessarily harsh remedy and would impact the rights of lessees who are not before the Court.
3 For that reason, courts have often suspended leases in such circumstances rather than issuing
4 relief that would have the effect of voiding them. The Court should do the same here.
5 Alternatively, if the Court finds a NEPA violation, Defendants request that the Court provide an
6 opportunity for additional briefing regarding an appropriate remedy.

7 In arguing for vacatur, Plaintiffs seem to assume that vacatur follows automatically from
8 a NEPA violation. It does not. While vacating an agency's decision may be appropriate in
9 particular circumstances, it is by no means a presumptive remedy. "Whether agency action
10 should be vacated depends on how serious the agency's errors are and the disruptive
11 consequences of an interim change that may itself be changed." *Cal. Cmty. Against Toxics v.*
12 *U.S. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (internal quotation marks and citation omitted).
13 "[W]hen equity demands," an agency's decision may "be left in place while the agency follows
14 the necessary procedures." *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir.
15 1995). In light of BLM's analysis of the environmental impacts of oil and gas development
16 arising from the June and September 2017 lease sales, Defendants do not believe that there are
17 any serious deficiencies in the NEPA analysis, and if the Court finds a violation of NEPA, any
18 such deficiency could be readily address through additional NEPA analysis.

19 Further, the vacatur of the lease sales, and therefore the leases that were issued as a result
20 of those sales, would have significant disruptive consequences for the lessees. Declaring the
21 lease sale void would terminate the lease rights of lessees who expended significant effort and
22 funds to obtain those rights. Such a result is not required by NEPA or the APA. In order to
23 avoid the unjust result of stripping lessees of their lease rights, the Ninth Circuit has on several
24 occasions sanctioned a remedy that fell short of vacating an oil and gas lease sale. In *Conner*,
25 the Ninth Circuit, after finding that BLM had violated NEPA with respect to the non-NSO leases
26 at issue, modified the district court's order to make clear that the leases were not set aside and
27 instead enjoined surface-disturbing activity pending compliance with NEPA and the ESA. 848
28 F.2d at 1460-61; *see also id.* at 1461 n. 50 ("By modifying the district court order in this case, we

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT was made through the Court's electronic filing and notice system (CM/ECF).

Dated: August 22, 2018.

/s/ Luther L. Hajek

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